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FCC MAIL SECTION

Before the

FCC 94M-519

FEDERAL COMMUNICATIONS COMMISSION

SEP 12 2 44 PM '94

Washington, D.C. 20554

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DISPATCHED BY  
In re Application

TELEPHONE AND DATA SYSTEMS, INC.

For facilities in the Domestic

Public Cellular Telecommunications

Radio Service on Frequency Block B,

in Market 715, Wisconsin 8 (Vernon),

Rural Service Area

) CC Docket No. 94-11

) File No. 10209-CL-P-715-B-88

MEMORANDUM OPINION AND ORDER

Issued: September 9, 1994 ; Released: September 12, 1994

Under consideration is the Motion to Compel Discovery, filed on August 19, 1994, by GTE Mobilnet Incorporated and the so-called Settlement Group<sup>1</sup>, hereinafter referred to as GTE and the Settlement Group; the Partial Opposition of SJI, Inc. to Motion to Compel Discovery and Argument in Support of Claim of Privilege, filed by SJI, Inc., (SJI), on September 6, 1994; and the Report on Document Production of United States Cellular Corporation and Telephone and Data Systems, Inc. and Opposition to Motion to Compel Discovery, filed by United States Cellular Corporation (USCC) and Telephone and Data Systems, Inc. (TDS), filed on September 6, 1994.

Movants seek an Order of the Presiding Judge compelling TDS and USCC and/or SJI to produce a document identified as a "note", which, they contend, is highly relevant to the matter at hand and should have been produced pursuant to the request for the production of documents served on these parties during the course of discovery. In addition, they request that certain witnesses be required to testify regarding communications for which counsel for TDS and SJI have claimed privilege. The pleadings submitted by SJI and USCC and TDS, in response to the instant Motion, were filed pursuant to a specific order of the Presiding Judge. See Order (FCC 94M-505), released on August 30, 1994.

Respondents were ordered to conduct a search for the "document" described by Movants as a "note" from La Star Cellular Telephone Company, Inc. (La Star), to Star Cellular Telephone Company (Star) in the amount of \$67,476.21. The Presiding Judge's previous Order, referenced above, made note

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<sup>1</sup>Century Cellunet, Inc., Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Farmers Telephone Company, Hillsboro Telephone Company, Lavalley Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative, and Viroqua Telephone Company.

of the fact that counsel for USCC doubted, in response to a question raised during the course of discovery, that such a document ever existed; however, the Presiding Judge was of the opinion that there was some ambiguity in the testimony with respect to its existence or nonexistence, and, if it did in fact exist, it would be relevant to the issues under consideration in this proceeding and should be produced. He ordered TDS and USCC to conduct a further search for the "note" in question. USCC and TDS, in their report filed pursuant to the Judge's order, state, initially, that they did not withhold any responsive documents relating to the acquisition of their interest in Star, but that, consistent with the Judge's order, they did conduct a further search of La Star documents, all of which were previously collected for this proceeding, to determine whether such a note exists or ever existed, but found none. Respondents state categorically that no such "note" is in their possession. The only support for Movants' contention that such a note exists, they assert, is a reference to a "note" in the Index to the Closing Bible and the Closing Memorandum for the Star/USCC stock transfer. They point out, however, that the Closing Bible itself suggests that there is no such note. Specifically, Item 31, described in the Index as an "Assignment of Note from SCTC to CSIIBR", is a July 31, 1987 letter, which was produced to Movants in June 1994 and provided to them again in August during the course of the oral depositions. They point out that the letter does not mention a "note", but refers instead to a debt in the same amount mentioned in the "note", which Movants seek to have produced, with La Star as the promisor and Star as the payee.

The Presiding Judge considers the response of USCC and TDS to be dispositive of this matter. There is nothing to contradict USCC and TDS' claim that the document identified as a "note", in fact, was the letter dated July 31, 1994, mentioned in the preceding paragraph, which has been produced. The Motion, to the extent that it sought the production of the same, is, therefore, considered moot, and Movants request for its production will be dismissed.

The Motion, as mentioned above, also seeks an order of the Presiding Judge compelling certain witnesses to testify with respect to matters for which a claim of privilege has been asserted. As noted by Respondents, the Motion is untimely. However, in the interests of moving this matter forward, the Presiding Judge considers it wise to rule on the merits of the request. With respect to the conversations between Michael G. Hron, an attorney, and Leroy T. Carlson, Sr., Chairman of Mr. Hron's client, any discussion with respect to legal matters would clearly be privileged: a point conceded by the Movants. It is their contention, however, that Mr. Hron, in his position as Secretary of TDS, would have been expected to give Mr. Carlson business advice which is not privileged. Mr. Hron, however, made it clear, during the course of his testimony, that any advice that he would have given Mr. Carlson would have been in his position as attorney to TDS and would have been legal in nature. Movants have failed to rebut this assertion. It appears, therefore, that Mr. Hron's claim of privilege was properly raised, and Movants request for a further examination of Mr. Hron will be denied. Similarly, the Presiding Judge finds that SJI's assertion of privilege was properly made, and the discussions between counsel for Mr. Belendiuk and counsel for SJI with

certain SJI witnesses during the course of their preparation for the depositions in this case were privileged. SJI and Mr. Belendiuk clearly share a common interest in this proceeding. The communications and interactions between these parties is certainly the focus of this investigation, and SJI, Mr. Belendiuk, and USCC and TDS have the burden of establishing to the satisfaction of this Commission that their representations, in the so-called La Star proceeding, that SJI was in control of La Star were true and candid. The parties sharing these mutual interests have entered into a formal Joint Defense Agreement, dated June, 1994; a copy of which was presented for the Presiding Judge's *in camera* inspection. It is clear from the document in question that Mr. Belendiuk's attorney's presence at these meetings was with the understanding that the confidentiality of the matters discussed would be preserved, and that the parties right to raise a claim of attorney/client privilege with respect to the matters discussed would not be compromised by the presence of Mr. Belendiuk's attorney. Accordingly, counsel for SJI will not be required to testify as to those matters for which he has claimed privileged communication.

IT IS ORDERED, that the Motion to Compel Discovery, filed by GTE Mobilnet Incorporated and the Settlement Group, on August 19, 1994, is found to be moot to the extent that it seeks the production of a document described as a "note" from La Star Cellular Telephone Company, Inc. to Star Cellular Telephone Company, Inc., and that portion of the Motion IS DISMISSED; and that the Motion is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph P. Gonzalez  
Administrative Law Judge